

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 ROBERT LILLBURN NELSON, III,

4 Plaintiff

5 v.

6 UNITED STATES GOVERNMENT,

7 Defendant

Case No.: 3:22-cv-00405-MMD-CSD

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF Nos. 1, 1-1

8 This Report and Recommendation is made to the Honorable Miranda M. Du, Chief
9 United States District Judge. The action was referred to the undersigned Magistrate Judge
10 pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

11 Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro
12 se complaint (ECF No. 1-1).

13 **I. IFP APPLICATION**

14 A person may be granted permission to proceed IFP if the person “submits an affidavit
15 that includes a statement of all assets such [person] possesses [and] that the person is unable to
16 pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense
17 or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1); *Lopez*
18 *v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to
19 all actions filed IFP, not just prisoner actions).

20 In addition, the Local Rules of Practice for the District of Nevada provide: “Any person
21 who is unable to prepay the fees in a civil case may apply to the court for authority to proceed
22 [IFP]. The application must be made on the form provided by the court and must include a
23 financial affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

1 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some
 2 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
 3 (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the
 4 benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

5 A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee;
 6 therefore, the application should be granted.

7 II. SCREENING

8 A. Standard

9 “[T]he court shall dismiss the case at any time if the court determines that-- (A) the
 10 allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails
 11 to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a
 12 defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

13 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 14 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii)
 15 tracks that language. As such, when reviewing the adequacy of a complaint under this statute, the
 16 court applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668
 17 F.3d 1108, 1112 (9th Cir. 2012) (“The standard for determining whether a plaintiff has failed to
 18 state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the
 19 Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim.”). Review under
 20 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*,
 21 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

22 The court must accept as true the allegations, construe the pleadings in the light most
 23 favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*,

1 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less
2 stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9
3 (1980) (internal quotation marks and citation omitted).

4 A complaint must contain more than a “formulaic recitation of the elements of a cause of
5 action,” it must contain factual allegations sufficient to “raise a right to relief above the
6 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading
7 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
8 a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a
9 plaintiff should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at
10 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

11 A dismissal should not be without leave to amend unless it is clear from the face of the
12 complaint that the action is frivolous and could not be amended to state a federal claim, or the
13 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
14 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

15 **B. Plaintiff’s Complaint**

16 Plaintiff’s complaint names only the United States government as a defendant, but it also
17 references the Department of Homeland Security. The only allegations are that Homeland
18 Security was put in place and causes Plaintiff psychological, emotional, and physical harm.
19 Plaintiff includes a letter to Magistrate Judge Carla Baldwin with his complaint, stating that he
20 has filed other lawsuits against the United States, and he is filing this third and final lawsuit
21 because the United States is using cell phone-like towers to allow electromagnetic radiation to
22 pass through Plaintiff’s body which allows Plaintiff’s body to become like a cell phone with a
23 mind reader.

1 Plaintiff has filed two other complaints with similarly fantastical allegations: 3:20-cv-
2 00687-MMD-CLB and 3:22-cv-00184-ART-CSD, which have been dismissed for failure to state
3 a claim.

4 “[A] litigant whose filing fees and court costs are assumed by the public, unlike a paying
5 litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive
6 lawsuits.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A complaint is frivolous “where it
7 lacks an arguable basis either in law or fact.” *Id.* This term “embraces not only the inarguable
8 legal conclusion, but also the fanciful factual allegation.” *Id.*

9 Plaintiff’s complaint includes only fanciful allegations and does not state any claim upon
10 which relief may be granted; therefore, the complaint should be dismissed. Plaintiff should also
11 be cautioned that given the number of these lawsuits he has filed, his conduct is bordering on
12 vexatious.

13 III. RECOMMENDATION

14 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

15 (1) **GRANTING** Plaintiff’s IFP application (ECF No. 1). Plaintiff is permitted to
16 maintain this action without prepaying the filing fee.

17 (2) The complaint (ECF No. 1-1) should be **FILED**.

18 (3) The action should be **DISMISSED WITH PREJUDICE** as frivolous and for failing
19 to state a claim upon which relief may be granted. Plaintiff should be cautioned that his
20 conduct is bordering on vexatious.

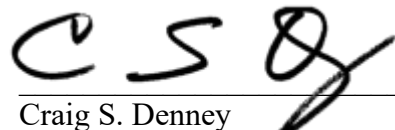
21 The Plaintiff should be aware of the following:

22 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
23 this Report and Recommendation within fourteen days of being served with a copy of the Report

1 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s
2 Report and Recommendation” and should be accompanied by points and authorities for
3 consideration by the district judge.

4 2. That this Report and Recommendation is not an appealable order and that any notice of
5 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
6 until entry of judgment by the district court.

7
8 Dated: September 20, 2022

A handwritten signature in black ink, appearing to read 'CS Denney', is written over a horizontal line.

Craig S. Denney
United States Magistrate Judge